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SUPREME COURT, U.S.

NO. 81-5383

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

ROBERT ALLEN MAY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should consider a matter to which no contemporaneous objection was made in the trial court as required by state law.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari files this brief in opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Petitioner's conviction for capital murder is attached to the petition as Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims are based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in agreement with Petitioner's abbreviated statement of the case. The only facts relevant to the issue presented concern the exclusion of certain venire members and whether defense counsel objected thereto on the basis of Witherspoon v. Illinois, 391 U.S. 510 (1968) as required by state procedural law. Petitioner apparently concedes that no objections were made on the proper ground.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to consider the issues presented.

Petitioner's failure to make contemporaneous objections as required by state law to the exclusion of prospective jurors precludes review of those matters in this Court. The State has a legitimate interest in requiring the parties to object to the exclusion of any juror during voir dire examination. Petitioner should not be allowed to complain now about a matter which he did not find objectionable at trial.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons, and none exists.

II. THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH NO CONTEMPORANEOUS OBJECTION WAS MADE AT TRIAL AS REQUIRED BY STATE LAW.

This Court has consistently declined to review matters to which no objection was made at trial, when state law requires such objection. The failure of a defendant to present a federal question in conformance with state procedure constitutes an

adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978). The Texas Court of Criminal Appeals held that Petitioner had waived his contention that certain veniremen were excluded from the jury panel in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). At the time of Petitioner's trial, Texas state law was settled that the failure of a defendant to voice a contemporaneous objection to the exclusion of a venireman in violation of Witherspoon waived the consideration of the error on appeal. Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976).

Contrary to Petitioner's assertions, the state court had not held that an objection to the exclusion of a juror pursuant to a state statute, Tex. Penal Code Ann. §12.31(b), was without merit. Rather, prior to this Court's decision in Adams v. Texas, 448 U.S. 38 (1980), the state court had recognized Section 12.31(b) to be an independent state ground for the exclusion of prospective jurors. An objection on federal constitutional grounds, however, has always been necessary under Texas law to preserve a federal constitutional claim.

The state has a legitimate interest in requiring the parties to make a contemporaneous objection to the exclusion of jurors during voir dire examination. Voir dire examination and the selection of a jury, perhaps more than any other event at trial, is an exercise in trial strategy for the parties. The decisions of counsel whether to accept a juror, to challenge a juror for cause, or to exercise a peremptory challenge are all matters of trial tactics and strategy. There are many reasons why defense counsel might decline to object to the exclusion of a prospective juror. A real possibility exists in every case where no objection is made that defense counsel did not want the juror to serve, and declined to object to the exclusion because of the risk that the juror would then be rehabilitated, which would then necessitate the use of a valuable peremptory challenge in order to remove the juror. In the instant case, it cannot be assumed

that the yet unestablished defect in Section 12.31(b) found by this Court in Adams v. Texas, was the only reason that defense counsel failed to object to the exclusion of the veniremen in question.

Federal courts have also recognized that reliance on a particular state of the law at the time of trial does not, by itself, constitute cause justifying excuse from the waiver caused by the failure to object. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981)(en banc); Dumont v. Estelle, 513 F.2d 793 (5th Cir. 1975); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974). In Dumont v. Estelle, the court stated that this rule must apply or later, "the courts would face the complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver." 513 F.2d at 798.

This Court has consistently recognized the state's interests in requiring contemporaneous objections to objectionable matters at trial. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973); Henry v. Mississippi, 379 U.S. 443 (1965). In Davis, the Court held that absent a requirement that the parties make contemporaneous objections in orders to preserve error, the parties would have little incentive to make such objections and,

> [s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thoughts that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at the time when reprosecution might well be difficult.

411 U.S. at 241. This is especially true where the asserted error involves jury selection proceedings, in which there are a multitude of tactical and strategic reasons why counsel specifically would not want to object to the exclusion of a juror at all. For example, in the instant case, Petitioner did not persist in his objections at trial. Following defense counsel's initial objections, the cautious trial judge allowed him to conduct further questioning. When the State's challenge for

cause was sustained following additional examination, counsel failed to re-urge his previous objections. This Court should decline to review a matter to which no proper objection was made in the state courts.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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